

# Councillor Conduct Tribunal decisions

17 April 2019

## **Key issues: conflict of Interest: whether a councillor could reasonably be taken to have a conflict of interest: consideration of a council policy**

The facts of this matter were agreed between the councillor and the OIA, but whether the facts of this case amounted to misconduct was disputed. By agreement with the councillor the OIA fast tracked this matter to the CCT to obtain the Tribunal's guidance on the scope of the conflict of interest provisions in the Act.

The CCT found the councillor engaged in misconduct for failing to declare a conflict of interest while voting on amendments to a CBD Development Incentive Policy.

The purpose of the incentive policy was to encourage new development within the CBD which is in line with council quality design and heritage character goals. The policy applied to a potentially large group of property owners.

The councillor is a part owner of two properties in the CBD Development Incentive Policy area.

The councillor had previously declared a conflict on two occasions when the policy was first adopted in 2015, and when it was first extended in 2017 - but did not do so when considering a further amendment of the policy in a meeting of the Economic Development Committee in 2018. The amendment to the policy involved a further extension of the incentive period to June 2021.

It was accepted by the OIA on the facts of this case that the councillor's omission was inadvertent and that the councillor demonstrated insight and awareness through a prompt apology to council and removing himself from voting on the matter, when the policy was subsequently considered by council.

The CCT noted that there was no evidence that the councillor had applied to obtain a benefit under the policy or that he intended to apply in the future, however as a property owner in the relevant area, he could apply for an incentive anytime within the extended two-year period.

The agreed statement of facts between the OIA and the councillor noted that any future application for an incentive would have had to meet the various eligibility requirements of the incentive policy and the decision to grant an incentive would also have required a separate decision of council.

The Tribunal considered whether a reasonable and fair minded observer might perceive that the councillor might not bring an impartial mind to the decision and make a decision contrary to the public interest and determined that it was satisfied, on the balance of probabilities, that the councillor did have a conflict of interest and that his failure to disclose that conflict was a breach of the trust placed in him as a councillor.

The councillor was ordered to make a public admission of misconduct, but due to his swift action at the time to correct his conduct, the order is considered fulfilled and no further action is required.



## 14 August 2019

Following the Tribunal's decision in the 17 April 2019 matter, the Independent Assessor referred this further matter to the CCT to determine if misconduct had been made out as it arose out of similar circumstances.

Again, the facts were agreed between the parties; the issue in dispute was whether the facts could amount to misconduct.

In this case, the councillor had a quarter-share in a property in the CBD incentivisation area through a self-managed superannuation fund. Again, there was no evidence that there had been any application to obtain a benefit for the property in question or that the councillor intended to in the future. The Tribunal formed that view that the councillor had an indirect personal interest in the matter being voted on, namely, whether the incentivisation scheme should be extended.

In considering whether this personal interest could create a real or perceived conflict of interest for the councillor, the Tribunal applied the test<sup>1</sup> as adapted to the local government context: 'whether a reasonable and fair minded observer might perceive that the councillor might not bring an impartial mind to the decision and [might] make a decision contrary to the public interest'.

In this case, the Tribunal gave greater consideration to the issue of the directness or remoteness of any potential benefit to the councillor.

The councillor's legal representative submitted that 'the case law makes plain that a conflict of interest must involve something which has a realistic capacity or propensity to influence the relevant decision; in other words, something not remote or insubstantial'.<sup>2</sup>

The councillor produced an expert report from an urban planning specialist who considered the applicability of the Incentive policy to the property in question and formed the view that the likelihood of the property securing an incentive under the policy in practical or commercial terms was 'highly unlikely'.

The respondent's legal representative stressed that the 'opportunity' to possibly benefit from the incentive scheme was not dependent on just the property being located within the incentive scheme footprint, but that the property must have a realistic potential for qualifying for the incentive.

The Tribunal considered that in all the circumstances a fair-minded observer would not consider that there was a real possibility that the councillor would be swayed in his decision making by considerations relevant to his interest in the property, in determination of the extension of the policy.

The facts which the Tribunal relied on in coming to this conclusion were:

- Applications under the policy were required to go through a two-step process to meet eligibility criteria and a further decision of council was required;
- The focus of the policy was the redevelopment of a particular character, such that it was apparently not easy to qualify;
- The interest of the councillor in the property in this instance was indirect, and subject to the agreement of other owners and or shareholders to apply for an incentive.

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<sup>1</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337

<sup>2</sup> *Aurizon Network Pty Ltd v Queensland Competition Authority & Ors* [2018] QSC 246 at 139



- The councillor and other owners of the property had not, to date, taken advantage of the apparent ability to apply;
- The likelihood of the extension of the incentive significantly influencing the value of the councillors indirect interest in the property or the feasibility of any redevelopment of the property, would appear to be remote.

The Tribunal therefore found that the councillor did not have a real or perceived conflict of interest in relation to the consideration of the incentivisation policy.

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What can councillors draw from this in deciding whether they have a personal interest or conflict of interest in relation to consideration of a council policy?

Relevant considerations would be:

- What is the purpose or object of the policy?
- What steps, eligibility criteria or further decision making is required under the policy for you to benefit from it?
- Have you previously applied for a benefit under the policy or similar or might you in future apply to benefit under the policy?
- What is the likelihood that your personal interest would benefit/ or suffer a detriment from the decision being made in relation to the policy?
- What is the likelihood that you would be eligible to benefit under the policy?

The Councillor Conduct Tribunal decisions can be found [here](#).

